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IN THE

Supreme Court of the United States

October Term 1961

No. 667

In the Matter of the Petition of

MOORE-McCORMACK LINES, INC.

as owner of the S.S. "MORMACKITE,"
for exoneration from or limitation of liability.

JEAN O. RICHARDSON, individually and as Executrix of the estate of HAROLD H. RICHARDSON, *et al.*,

Petitioners,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BURLINGHAM UNDERWOOD BARRON
WRIGHT & WHITE
Proctors for Respondent—

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

(A) As to the first question presented:

The Court of Appeals said:

> "The District Court properly offset against the award sums paid to Richardson's widow under a liability insurance policy (derived from the Second Seamen's War Risk Policy) taken out by petitioner and on which all premiums had been paid by petitioner" (Ap. 26; such references are to the appendix attached to the present petition).

Similar comment was made as to Berk and Cadiz (Ap. 28, 30).

The beneficiaries of Richardson, Berk and Cadiz were paid $5,500, $5,500 and $5,300 respectively under a policy of insurance derived from the Second Seamen's War Risk Policy, 46 C.F.R. 308.306. By statutory mandate Clause 25 of the policy provided that there was to be no duplication of payment, i.e., if there were tort liability on the shipowner, amounts paid under the policy had to be deducted from the amount of tort liability. 50 U.S. Code App. 1292(b). The same Clause 25 was carried over into the policy here (Exh. 47).

Here the insurance in question was payable to the decedents' beneficiaries in any event, i.e., whether or not death resulted from a cause for which Moore-McCormack might be liable in damages.

Petitioners concede that Moore-McCormack paid the policy premium. There is neither finding nor evidence to support their assertion that the premium payments were a condition of the decedents' employment (p. 6).

There is no conflict in the authorities. The general rule is stated in the *Restatement, Torts*:

> Section 920. Benefit to plaintiff resulting from defendant's tort.
>
> "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable."

This rule has been consistently followed in cases where the tort feasor has conferred a benefit in mitigation of the injured person's damages, whether by insurance, contribu-

tion, gift, payment of maintenance or otherwise. *Burch* v. *United States*, 4 Cir., 261 F. 2d 418, 420; *Brooks* v. *United States*, 4 Cir., 176 F. 2d 482 (see also 337 U.S. 49); *Lawson* v. *United States*, 2 Cir., 192 F. 2d 479; *O'Connor* v. *United States*, 2 Cir., 269 F. 2d 578. To the same effect see: *Southwestern Brewery* v. *Schmidt*, 226 U.S. 162; *Schumacher* v. *Rosenthal*, 226 F. 2d 946; *McWhirter* v. *Otis Elevator Co.*, 40 F.Supp. 11; *Lundy* v. *Calmar S.S. Corp.*, 96 F.Supp. 19; *Schellenger* v. *Zubik*, 170 F.Supp. 92; *Walsh* v. *Boston Sand & Gravel*, 175 F.Supp. 411; *Wuth* v. *United States*, 161 F.Supp. 661; *Panichella* v. *Pennsylvania R. Co.*, 167 F.Supp. 345, rev'd other grounds, 268 F. 2d 72.

The cases cited by claimants* illustrate the *exception* to the rule stated in the *Restatement*. Comment e to Section 920 reads:

> "e. *Benefits Received from Third Persons.* The rule stated in this Section does not apply where • • • such benefit is the result of the forethought of the plaintiff or of a gift to him by a third person. • • •"

In each the party sought to be charged with liability had *not* provided the payments of which he sought the benefit. Here, however, Moore-McCormack procured and paid for the insurance of which these petitioners were the direct beneficiaries.

Petitioners say (p. 7) that the District Court treated the individual recipients of the insurance as identical with

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* *Standard Oil of Calif.* v. *U.S.*, 153 F. 2d 958 (9th Cir.), affirmed 332 U.S. 301; *Hudson* v. *Lazarus*, 217 F. 2d 344 (C.C.A.D.C.), *Sainsbury* v. *Pennsylvania Greyhound Lines, Inc.*, 183 F. 2d 548 (4th Cir.); *Chicago Great Western Ry. Co.* v. *Peeler*, 140 F. 2d 865 (8th Cir.); *Brabham* v. *Baltimore & Ohio R.R. Co.*, 220 Fed. 35 (4th Cir.); *Healy* v. *Rennert*, 9 N.Y. 2d 202; *Geary* v. *Metropolitan Street Railway Co.*, 73 App. Div. 441 (N.Y.); *U.S.* v. *Harue Hayashi*, 282 F. 2d 599 (9th Cir.).

the statutory beneficiaries. Not so. Compare the *Wall* case. The District Court made no deduction there, and Moore-McCormack claimed none, because the beneficiary of that policy was the mother, who was not a statutory beneficiary.

Only hardship could result if it were the rule that a tort feasor cannot lessen the amount of his liability by mitigating the injured person's damages, whether before or after the event.

No conflict exists. The law is clear and this point does not merit this Court's attention.

(B) As to the second question presented:

The District Court denied pre-judgment interest on the death damage awards on the authority of *Casey* v. *American Export Lines*, 2 Cir., 173 F. 2d 324, reversed on other grounds, 176 F. 2d 337. It also denied pre-judgment interest to the injury claimants, but they did not appeal.

The Court of Appeals "remanded to the District Court for allowance of pre-judgment interest" (Ap. 34), holding that the Death on the High Seas Act does not prohibit the allowance of interest (Ap. 35-6) and refusing to be bound by the decisions under the Jones Act and the F.E.L.A., even its own *Casey* (Ap. 37-9). The Court held that since it is fair to discount sums presently paid on account of lost contributions which are not due until the future, it is only fair to allow interest for delay in paying sums that would have been paid by the decedent, had he lived, between death and decree. The Court held, however, that claimants are not necessarily entitled to interest at the full legal rate; that this is a matter for the discretion of the District Judge, and that it would seem appropriate to allow pre-judgment interest for pecuniary losses at 4% (Ap. 39-40). The Court further held that interest on sums past due should not run

from the date of death but from several dates at which they would have accrued* (Ap. 40-1).

Although the Court did not expressly say so, it is clear that it was doing no more than exercising the discretion, which all courts have in admiralty, to allow interest in whole or in part, or disallow it altogether, as seems fair under the circumstances of each case. This is settled law. In *The Scotland*, 118 U.S. 507, this Court said:

> "The allowance of interest on damages is not an absolute right. Whether it ought or not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or jury" (pp. 518-19).

To the same effect see *Benedict on Admiralty*, 6th Ed., Vol. 3, p. 191; *Corpus Juris Secundum*, Admiralty, Vol. 2, §205b, p. 358; Norris, *The Law of Seamen*, §695, p. 387.

If the Court was free to allow any pre-judgment interest, this point does not merit this Court's attention unless discretion was abused. The Court was under no compulsion to follow *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400, for at least two reasons: The decision in *Stiles* was *de novo*, the Court admitting (p. 405) that it could find no precedent under the Death on the High Seas Act although that Act had been in effect almost 40 years. Moreover the District Court in *Stiles* had, as the Court of Appeals said (p. 405), "made plain its finding that the award was a fair measure of Mrs. Stiles' pecuniary loss *as of the date of her husband's death*, and interest on the amount was awarded

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* If $1,000 would have been contributed in the first year following death, interest would run on that $1,000 from that year to decree; if another $1,000 would have been contributed in the second year, interest would run on it from *that* year to decree.

to make her recovery complete." (Italics added.) On the contrary, McGohey, *J.*, in this case fixed the damages sustained year by year and found just what were the annual increments of pecuniary loss in each death case from the year of death until the end of the expectancy of the longest-lived beneficiary. For example, in the *Richardson* case, McGohey, *J.*, found that the pecuniary benefits from the year of death through 1959 were $6,375 per annum; for 1960 through 1962 also $6,375 per annum; for 1963 through 1968, $9,225 per annum, and so on. In the light of these findings the Court of Appeals allowed pre-judgment interest on the amounts as they would have accrued year by year from the year of death to the entry of final decree. *Stiles* is, of course, no precedent in a case where there have been such findings as here. *Ches. & Ohio Ry.* v. *Kelly*, 241 U.S. 485, 489-90.

If the Court was entitled to exercise its admiralty discretion, petitioners can have no complaint that it overruled its own decision in *Casey* v. *American Export Lines*, 2 Cir., 173 F. 2d 324, and numerous other cases* holding that pre-judgment interest cannot be allowed in Jones Act and F.E.L.A. cases.

The decision below does not conflict with *Van Beeck* v. *Sabine Towing Company*, 300 U.S. 342, or *Matter of Meekin* v. *B.H.R.R. Co.*, 164 N.Y. 145, and petitioners' reliance upon them is based upon a misunderstanding. *Van Beeck* and *Meekin* held only that the pecuniary loss sustained by a beneficiary who dies before trial becomes liquidated at the moment of the beneficiary's death and, at that point,

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* *Cortes* v. *Baltimore Insular Line, Inc.*, 2 Cir., 66 F. 2d 526, reversed on other grounds, 287 U.S. 367; *Cleveland Tankers* v. *Tierney*, 6 Cir., 169 F. 2d 622, 626; *Powers* v. *New York Central R Co.*, 2 Cir., 251 F. 2d 813; *Briggs* v. *Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481; *Lynott* v. *Great Lakes Transit Corp.*, 202 App. Div. 613, affirmed 234 N.Y. 626.

can be considered a "property" loss. Petitioners cite no authority for the claim that they lost any property right when their decedents died. Their only right is a statutory right, one which comes into being only upon the occurrence of wrongful death. In *Sider* v. *General Electric Co.*, 238 N.Y. 64, the New York Court of Appeals expressly refuted the argument petitioners make here and took pains to explain *Meekin*—pp. 69-70. Cardozo, *J.*, who wrote *Van Beeck* and in which he cited *Meekin*, was a member of the unanimous court that decided *Sider*.

If interest is allowable at all, despite the Jones Act and the F.E.L.A. rule, the Court was plainly right in not allowing interest from the date of death because the District Court did not fix the damages it found as of the date of death. On the contrary, as appears *supra* page 6, the District Court found the damages year by year. The District Court did not discount the sums it found these death claimants had lost between the time of death and the time of its decree; on the contrary, these it allowed in full, and discounted only the awards for what it found the death claimants would have received in the years which still lay ahead at the time of its decree. To allow interest from the date of death would unfairly enrich these death claimants who could never have received the contributions they claim to have lost except over a long period of time, much of which is still in the future. Against this background the Court was plainly right in saying:

> "Of course interest on sums past due will not run from the date of death, but from the several dates at which the sums would have accrued" (Ap. 40).

As to the allowance of interest at four per cent rather than six per cent, the Court of Appeals said:

> "The allowance of interest at the full legal rate would seem based on the unrealistic assumption that

> the claimants would have invested all they received so skillfully as to yield a return above that given by prudent investments not requiring special skill and attention by the investor. * * * Since the allowance for loss of future benefits to the dependents of the four deceased men is discounted at four per cent, it would seem appropriate for the District Judge also to compute interest at a four per cent rate on the allowances for pecuniary losses sustained prior to decree" (Ap. 40).

There is no abuse of discretion here.

There are two other objections to granting a writ to consider this question. It is to some extent premature because the District Court has not yet decided how far it will follow the admonition of the Court of Appeals and has not made the contemplated calculations envisaged by the Court of Appeals' examples in footnote 16 as to how its decision should be applied. Also the question is to some extent moot because very large parts of the death damage awards have been paid. For example, in the Richardson case the District Court awarded $31,875 for pecuniary benefits already lost and $118,296 for future benefits. Shortly after the decree was entered Moore-McCormack paid all of this but about $5,000, with interest from date of decree to date of payment. In the Wall case the District Court awarded $40,194 and $111,625 for pecuniary benefits already lost and for future benefits, respectively, and shortly after the decree was entered Moore-McCormack paid all of this but about $5,000, with interest from decree to date of payment. Corresponding payments were made in the Cadiz and Berk cases.

If a writ is granted, respondent will urge that the Court of Appeals erred in allowing any pre-judgment interest.

(C) As to the third question presented:

The findings of the District Court as to conscious pain and suffering while in the water until death or rescue were, *in toto:*

> "All of the survivors were weak and weather-worn when they were taken from the water at various times on the morning of October 9. They had been without food and drink for from 46 to 50 hours; their eyes and throats were irritated by the salt water; the rubbing of their life jackets and of the boards they hung onto caused multiple abrasions of their chests, arms and legs; until rescued they all feared for their lives. It is a reasonable assumption that, up until he died, each deceased suffered similarly. I find he did."

The District Court appraised these experiences at $300 per hour. There is nothing in the Court's findings to support petitioners' assertion (p. 13) that the hourly rate was based on effects of the experience in the water which were still observable* when some of the survivors testified at trial.

On appeal, Moore-McCormack accepted the District Court's findings as to the nature and extent of the experience in the water, and so did the Court of Appeals (Ap. 24). However, the Court of Appeals held:

> "That we have both the power and the duty to examine awards for excessiveness, even when the awards are made by a jury, seems well established. See *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797 (2 Cir. 1961). We do so here where the awards were made by a judge in admiralty" (Ap. 23).

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* The District Court commented on its observations of Rosario and DeJesus when they testified; however, these comments were anent the claims of these men for continuing permanent neuroses for which they were separately compensated and did not relate to pain and suffering while in the water.

After considering the District Court's findings, the Court of Appeals said:

> "We think $300 per hour for pain and suffering while in the water is excessive. * * * As the awards in each case turn on so many varied facts, no purpose would be served in citing precedents. However, from such guidance as the numerous decisions dealing with the problem afford, we conclude that the award of $300 an hour is excessive and that it should be reduced to $150 per hour" (Ap. 24).

There can be no doubt as to either the right or the duty of the Court of Appeals to make its own appraisal. This is true in jury cases, *Dagnello* v. *Long Island R.R. Co.*, 2 Cir., 289 F. 2d 797, and the numerous cases there reviewed, and, *a fortiori*, in admiralty. True, the finding below must be "clearly erroneous" but, when it is, the Court of Appeals may set it aside and make its own. *McAllister* v. *United States*, 348 U.S. 19, 20; *Petterson Lighterage and T. Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. 2d 992.

Petitioners' contention (p. 13) that the Court of Appeals may not reappraise the value of an hour of pain and suffering because it did not observe the surviving claimants who testified cannot be sound. If it were, no appellate court could ever reverse or modify for excessiveness or inadequacy. The amount of damages is a question of fact which the Court of Appeals had every right to review and redetermine if it concluded, as it obviously did, that the award below was "clearly erroneous." *Brooklyn Eastern District Terminal* v. *United States*, 287 U.S. 170. *Hildebrand* v. *United States*, 2 Cir., 226 F. 2d 215. *Mason* v. *United States*, 2 Cir. 177 F. 2d 352. *Carrol* v. *United States*, 2 Cir., 133 F. 2d 690.

The District Court made no finding of bitter pain or extreme suffering. Its findings, quoted above, were that

those who survived were without food or drink for 46-50 hours; their eyes and throats were irritated by salt water; their skin was chafed by the rubbing of life jackets and boards to which they clung; upon rescue they were "weak and weather-worn" and, until rescue, they feared for their lives. The only question presented under this point is the hourly value of this particular experience. This does not merit the attention of this Court.

(D) As to the fourth question presented:

The District Court found that Lawrence Berk, with an expectancy of 46 years, was survived by his father and mother with expectancies of 20 and 30 years respectively; that he was unmarried but would have married and established a home of his own by the time he reached the age of 30, in 1959. The Court disbelieved much of Mrs. Berk's testimony but found that Berk would have contributed "at most" $1,000 per annum to his parents in 1955 through 1959, and awarded them $5,000 for this loss and this sum has been paid. For lost contributions after 1959 the Court awarded the parents $20,000, although it found that his probable marriage in 1959 "would preclude the possibility of such continued generosity ["at most" $1,000 per annum]." Nevertheless, the District Court based the $20,000 award on the same $1,000 per annum figure. Moreover, it mistakenly assumed that contributions at that rate would be made throughout the *decedent's* lifetime, whereas it should have made an award only for the period of the *beneficiaries'* expectancies.

The Court of Appeals found:

> "For loss to Berk's parents of future benefits, the lump sum of $20,000 was allowed. As Moore-McCormack points out, this is sufficient to provide an annuity of $1,000 per year to the parents for the normal

life expectancy of their deceased son, despite the fact that they would normally have predeceased him by a considerable period of time. * * * In any event, in view of the trial judge's finding that Berk would have married by the time he reached the age of thirty in 1959, it is highly improbable that Berk would have been able to give or would have given to his parents so substantial a sum as was here awarded. * * * Under these circumstances Berk might reasonably be expected to give, at the very most, $500 per year during the twenty-five years of life expectancy of the younger parent at the time of the decree. The present value of an annuity of $500 per year for twenty-five years discounted at 4% is $7,811. Recognizing that Berk might from time to time make special gifts to his parents, we think a proper allowance was $10,000 and accordingly we reduce this portion of the award from $20,000 to $10,000" (Ap. 27-8).

This $10,000 has been paid.

The High-Speed Mathematics Table (Ex. 46), which the Court used in all cases, shows that the present value of $1,000 a year for 41 years is $19,993. This, rounded off, equals the $20,000 award. In 1959, the year from which loss of future contributions was calculated, the expectancies of the father and mother were 20 and 25 years respectively. The award for future contributions should have been computed on joint expectancies, or at most on the expectancy of the younger surviving parent, approximately one-half the number of years the Court actually used. *Briscoe* v. *United States*, 2 Cir., 65 F. 2d 404, 405; *Muratore* v. *United States*, 100 F. Supp. 276, 283, S.D.N.Y.

The Court of Appeals' recomputation was clearly right.

This point involves no question of law nor any question of general interest and does not merit the attention of this Court.

Special Prayer

Respondent prays the Court to consider with this petition its cross-petition shortly to be filed.

Respondent also prays the Court to indicate, should this petition be granted, which points it will consider and which it will not so that respondent may make full and final payment as promptly as possible to any claimants whose claims will not be before this Court.

Respectfully submitted,

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Moore-McCormack Lines, Inc.

Dated: New York, New York
January 31, 1962